1997

State of Utah v. Linda A. Kalmar : Brief of Appellee

Utah Court of Appeals

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Joan C. Watt; Lynn R. Brown; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellant,	:	
v.	:	
LINDA A. KALMAR,	:	Case No. 970747-CA Priority No. 2
Defendant/Appellee.	:	

BRIEF OF APPELLEE

State appeal from the grant of a motion to withdraw a no contest plea for Attempted Theft, a class A misdemeanor, in violation of Utah Code Ann. § 76-6-404 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable David S. Young, Judge, presiding.

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October 30, 1998

Ms. Julia D'Alesandro
Clerk of the Court
Utah Court of Appeals
450 S. State, 5th Floor
P. O. Box 140230
Salt Lake City, Utah 84114-0230

Dear Ms. D'Alesandro:

Re: State v. Kalmar
Case No. 970747-CA

Pursuant to Rule 24(h), Utah Rules of Appellate Procedure, Appellee Linda Kalmar cites the following supplemental authorities in support of her argument that strict compliance is required in order to incorporate a plea affidavit where the concern is whether the defendant was properly "advised of the time limits for filing any motion to withdraw the plea" as required by Rule 11(e)(7), Utah Rules of Criminal Procedure.

State v. Mills, 898 P.2d 819, 823 (Utah App. 1995) (trial court must engage in plea colloquy to ensure that requirements of Rule 11(e) are met)

State v. Gibbons, 740 P.2d 1309, 1313 (Utah 1987) ("Rule 11(e) squarely places on trial courts the burden of ensuring that ... rule 11(e) requirements" are met; cannot assume that defense attorney made sure defendant understood contents of the affidavit)

State v. Vasilacopulos, 756 P.2d 92, 94 (Utah App. 1988) ("may not rely on defense counsel or executed affidavits to satisfy the specific requirements of Rule 11(e)")

Judges Bench, Greenwood and Garff heard argument on this case on October 29, 1998. I would appreciate it if you would distribute this letter of supplemental authority to those judges at your earliest convenience.

Sincerely,

Joan C. Watt

Joan C. Watt
Attorney for Appellee

JCW:kll

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused the original and seven copies of the foregoing to be hand-delivered to the Utah Court of Appeals, 450 S. State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies of the foregoing to Laura B. Dupaix, Utah Attorney General's Office, Heber M. Wells Building, 160 E. 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 30th day of October, 1998.

Joan C. Watt

JOAN C. WATT
Attorney for Appellee

DELIVERED this _____ day of October, 1998.

_____

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over the state's appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996). The state has the ability to appeal an order allowing withdrawal of a guilty plea pursuant to Utah Code Ann. § 77-18a-1(2)(g) (Supp. 1997). A copy of the "Order Allowing Defendant to Withdraw No contest Plea in Abeyance" which the state is appealing is in Addendum A.

STATEMENT OF ISSUE, STANDARD OF REVIEW AND PRESERVATION OF ARGUMENT

Whether the trial judge had the power to withdraw Appellee's plea of no contest prior to sentencing but more than thirty days after the plea hearing, where such plea was held in abeyance and Appellee was not informed of the thirty-day limitation for withdrawing pleas.

Standard of Review. This issue involves a question of law which should be reviewed for correctness. See State v. Grate, 947 P.2d 1161, 1164 (Utah App. 1997)(statutory interpretation and jurisdictional issues present questions of law which are reviewed for correctness).

Preservation. The state argued in the trial court that a request to withdraw a no contest plea must be made within thirty

days of the plea proceeding. R. 63.

TEXT OF RULES, CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Code Ann. § 77-2a-1 (1995) provides:

> **77-2a-1. Definitions.**
> For purposes of this chapter:
> (1) "Plea in abeyance" means an order by the court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant, but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement.
> (2) "Plea in abeyance agreement" means an agreement entered into between the prosecution and the defendant setting forth the specific terms and conditions upon which, following acceptance of the agreement by the court, a plea may be held in abeyance.

Utah Code Ann. § 77-2a-2 (1995) provides in pertinent part:

> **77-2a-2. Plea in abeyance agreement--Negotiation--Contents--Terms of agreement--Waiver of time for Sentencing.**
> (1) At any time after acceptance of a plea of guilty or no contest but prior to entry of judgment of conviction and imposition of sentence, the court may, upon motion of both the prosecuting attorney and the defendant, hold the plea in abeyance and not enter judgment of conviction against the defendant nor impose sentence upon the defendant within the time periods contained in Rule 22(a), Utah Rules of Criminal Procedure.

Utah Code Ann. § 77-2a-3 (Supp. 1997) provides in pertinent part:

> **77-2a-3. Manner of entry of plea--Powers of court.**
> (1) Acceptance of any plea in anticipation of a plea in abeyance agreement shall be done in full compliance with Rule 11, Utah Rules of Criminal Procedure.
> (2) A plea in abeyance agreement may

provide that the court may, upon finding that the defendant has successfully completed the terms of the agreement:

(a) reduce the degree of the offense and enter judgment of conviction and impose sentence for a lower degree of offense; or

(b) allow withdrawal of defendant's plea and order the dismissal of the case.

(3) Upon finding that a defendant has successfully completed the terms of a plea in abeyance agreement, the court shall reduce the degree of the offense, dismiss the case only as provided in the plea in abeyance agreement or as agreed to by all parties. Upon sentencing a defendant for any lesser offense pursuant to a plea in abeyance agreement, the court may not invoke Section 76-3-402 to further reduce the degree of offense.

Utah Code Ann. § 77-13-6 (1995) provides:

77-13-6. Withdrawal of plea.

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2) (a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.

(b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.

(3) This section does not restrict the rights of an imprisoned person under Rule 65B, Utah Rules of Civil Procedure.

Rule 11, Utah Rules of Criminal Procedure provides:

Rule 11. Pleas.

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(2) the plea is voluntarily made;

(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(4) (A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(6) if the tendered plea is a result

of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, an affidavit reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the affidavit. If the defendant cannot understand the English language, it will be sufficient that the affidavit has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g) (1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved by the court.

(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(h) (1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(3) If the judge then decides that final disposition should not be in

conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(i) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(j) When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code Ann. § 77-16a-103.

Rule 23, Utah Rules of Criminal Procedure provides:

Rule 23. Arrest of judgment.

At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances.

STATEMENT OF THE CASE

In an Information dated September 1, 1995, the state charged Defendant/Appellee LINDA A. KALMAR ("Appellee" or "Kalmar") with theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1995). R. 5-6. Appellee was booked and released to Pretrial Services on May 5, 1997. R. 2.

On September 15, 1997, Appellee appeared before the Honorable David S. Young, Third District Court, Salt Lake County and pleaded no contest to attempted theft, a class A misdemeanor.

R. 52. That no contest plea was made pursuant to a plea in abeyance agreement between Appellee and the state. R. 46-50, 26-27. A copy of the plea in abeyance agreement is in Addendum B; a copy of the Statement of Defendant ("Affidavit") is in Addendum C; a copy of the transcript of the September 15, 1997 hearing is in Addendum D.

On November 6, 1997, prior to sentencing and following off the record discussions between the parties and the judge, the trial judge allowed Appellee to withdraw her plea in abeyance. R. 60-66. The transcript of the November 6, 1997 hearing is in Addendum E.

On November 24, 1997, the trial judge signed the "Order Allowing Defendant to Withdraw No contest Plea in Abeyance"; that order was filed on December 1, 1997. R. 31. See Addendum A. The state filed its Notice of Appeal on December 5, 1997. R. 33.

STATEMENT OF FACTS[1]

Appellee was employed by Cook's Books. R. 54-55, 61. She did not receive a salary; instead, she received a commission based on a percentage of book sales that she made. R. 55.

In August 1994, Kalmar submitted her resignation. R. 55. At that time, Kalmar had outstanding commissions for which she was still receiving money. R. 55.

People who had purchased books from Kalmar sent checks

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[1] Because the case did not go to trial, evidence was not introduced. The fact statements in Appellee's and Appellant's briefs are based on statements in the Information, the plea affidavit and the plea in abeyance agreement as well as statements made during the plea and restitution hearings.

directly to her. R. 55. Believing that Kalmar had the money coming to her for commissions, Kalmar and/or her sister deposited three checks from clients directly into Kalmar's account. R. 55. The three checks totaled $1,530.28. R. 26.

It is not clear from the record whether Kalmar was due $1,530.28 in outstanding commissions or whether the amount was actually more or less than that. At the restitution hearing during which the judge withdrew Kalmar's plea, the judge indicated that during off the record discussions, he had been told that the company sent some correspondence which "indicated that in fact the net obligation after they offset the commissions they owed her and the money that she owed them, and so on, was something like $687... ." R. 61. That correspondence is not in the record and the judge did not take evidence as to Kalmar's position in regard to any possible restitution.[2] Additionally,

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[2] The state incorrectly claims in its brief that "[a]t the restitution hearing, defendant represented to the court that after offsetting the monies owed her by her former employer, she owed the company $687.00 in restitution (R. 61)." State's brief at 5 (footnote omitted). The record actually shows that the trial judge indicated that in an off the record discussion, he had been shown correspondence in which Cook's Books claimed $687 in restitution. Defense counsel stated that the trial judge's recitation of the off the record discussion and the judge's statement that the amount claimed by Cook's Books in the letter "was something like $687 dollars" was "pretty close." R. 61; see Addendum E containing R. 61-62. The record does not support the state's claim in its fact statement that it was Kalmar's position that she owed $687 in restitution. Indeed, Kalmar's position throughout these proceedings has been that she did not owe any restitution. See R. 47-49, 54-55, 61-62 in Addenda D and E. Moreover, Kalmar did not make any statement admitting or even suggesting that she owed Cook's Books any restitution. See State v. Galli, Case Nos. 960018, 960122, 960123, slip op. at 12 (Utah 1998)(statement by attorney in restitution hearing does not constitute admission by defendant).

the judge recognized that there was "the difficulty of determining restitution." R. 60-61. The judge did not make a finding as to the amount of restitution, if any, Kalmar owed Cook's Books.

On September 15, 1997, Kalmar pleaded no contest to a class A misdemeanor attempted theft, with that plea to be held in abeyance on the terms contained in the plea in abeyance agreement. R. 52, 26-27. Pursuant to the plea in abeyance agreement, if the trial judge found after a restitution hearing that Cook's Books owed Kalmar $1,530.28 or more, Kalmar could withdraw her plea in abeyance and the case would be dismissed six months after the plea hearing. R. 26-27; see Addendum B. If the judge found that the commissions due Kalmar were less than $1,530.28 and that Kalmar therefore owed restitution, Kalmar could withdraw her plea in abeyance and have the case dismissed after she paid such restitution. R. 27.

At the plea proceeding, the trial judge was initially concerned with whether a restitution hearing ought to be held prior to his acceptance of a plea from Kalmar. R. 47-49. Thereafter, the trial judge conducted "an abbreviated colloquy." R. 55.[3] Although there was a plea affidavit, the judge did not

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[3] The trial judge, who is experienced and thorough, and who has conducted numerous plea colloquys during his years on the bench, appears to have intentionally not followed the dictates of Rule 11, perhaps due to his concern as to whether this matter was criminal in nature. Prior to the colloquy, the trial judge asked the prosecutor, "[i]f you went through the evidence and found out that, indeed, [Cook's Books] owed her money, you wouldn't want to prosecute her?" The prosecutor responded, "Right," and went on to say that if it turned out that Kalmar did not owe money, the state

ask Kalmar whether she had read, understood and acknowledged the affidavit. R. 46-56; see "Statement of Defendant" ("Affidavit") in Addendum C. Instead, the colloquy was limited to asking whether Kalmar (1) understood that the no contest plea would be treated as an admission of guilt if the judge later had to review the matter, (2) understood that she was waiving her right to a trial, the requirement that the state call witnesses, and her right to silence, (3) was satisfied with the advice of defense counsel, and (4) was under the influence of any drug, alcohol, narcotic, or anything which would impair her judgment. R. 50-51. The judge did not discuss the elements of the crime, the facts as they related to those elements or the thirty-day limit for withdrawing pleas, among other things.

After Kalmar pleaded no contest and the court scheduled a restitution hearing, defense counsel asked the court, "[s]hall we execute this?" R. 54. The judge then directed Kalmar to sign the Affidavit. R. 54. No other discussion regarding the plea Affidavit occurred.

At the conclusion of the hearing, the judge asked defense counsel whether he "wanted to say something more about the facts and elements." R. 54. Defense counsel responded:

Defense counsel: The issue is, she put in her

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would "essentially dismiss the case," but that he didn't think that was "the way it's going to come down." R. 49. The judge then asked whether the state had any objections to holding the evidentiary hearing prior to taking the plea. R. 49. Although the plea was ultimately taken, this exchange evidences concern by the judge prior to the plea colloquy as to whether this case involved a criminal matter.

> resignation for her employment, and at the time she put in her resignation she still had some money coming on commissions. She didn't receive a salary; she got a percentage of all book sales. She made sixteen percent. And the resignation--the letter of resignation was in August of '94, and so terminated her employment at that time.

R. 54-55. This is the only discussion regarding the "facts and elements." R. 54.

A few days before the November 6, 1997 hearing, the parties and judge had an off the record discussion during which they apparently agreed to withdraw the plea and set the matter for trial. R. 60. At the November 6, 1997 hearing, the judge made a record of that discussion, indicating that there was difficulty determining restitution and that the matter appeared to be an accounting dispute which should be settled in civil court. R. 62. The state argued that the time for withdrawing the plea had passed. R. 63. The trial court stated that there was "good cause for allowing the plea to be withdrawn," denied the state's objection and allowed the plea to be withdrawn. R. 64. On December 1, 1997, the trial court entered the "Order Allowing Defendant to Withdraw No contest Plea in Abeyance" which stated,

> Pursuant to the defendant's motion, IT IS HEREBY ORDERED that her plea in abeyance to a Class A Theft that was entered on September 15, 1997 is withdrawn. After reviewing the material and discussing the matter with Ernie Jones, Deputy District Attorney and defendant's attorney, Lynn R. Brown, the Court on the motion of the defendant terminates the plea in abeyance and declines to enter judgment against her.

R. 31.

SUMMARY OF ARGUMENT

The trial judge correctly concluded that he had the authority to allow withdrawal of Kalmar's plea in abeyance. Three distinct bases for this authority exist.

First, the thirty-day limitation of Utah Code Ann. § 77-13-6(2)(b) (1995) is not triggered unless the defendant is informed of the thirty-day limitation on withdrawing pleas during the plea proceedings. Rule 11, Utah Rules of Criminal Procedure appears to require that the trial judge explicitly inform the defendant of this limitation during the colloquy. The trial judge did not mention the thirty-day limitation during the plea colloquy in this case.

Even if a statement in the plea affidavit would suffice to inform the defendant of the thirty-day limitation, the plea affidavit must be properly incorporated in order to rely on the affidavit as the basis for establishing that the defendant was informed of the thirty-day rule. In this case, the Affidavit was not incorporated into the record since (1) the trial judge did not ascertain that Kalmar had read, understood and acknowledged the Affidavit, and (2) the trial judge did not clarify ambiguities created by the Affidavit and the plea in abeyance agreement which allowed Kalmar to later withdraw her plea without any time limitations. Because the Affidavit was not incorporated and the judge did not mention the thirty-day limitation during the colloquy, the jurisdictional nature of the thirty-day limitation of section 77-13-6(2)(b) was not triggered in this

case.

Second, Rule 23, Utah Rules of Criminal Procedure allows a trial judge to withdraw a guilty or no contest plea at any time prior to imposition of sentence. That rule explicitly states that a trial judge may arrest judgment "[a]t any time prior to the imposition of sentence ... if the facts ... admitted do not constitute a public offense ... or there is other good cause for the arrest of judgment." In this case, the trial judge properly arrested judgment based on his determination that the matter was civil in nature and did not constitute a crime. In addition, the trial judge properly arrested judgment based on the noncompliance with Rule 11, Utah Rules of Criminal Procedure in taking the plea.

Third, a plea in abeyance is not "entered" until after the conclusion of the plea in abeyance agreement and only if the defendant does not meet the conditions of the plea in abeyance agreement. The plea in abeyance agreement in this case contemplated that Kalmar's no contest plea was not "entered" at the plea proceeding so as to trigger the thirty-day rule of section 77-13-6(2)(b) since the plea in abeyance agreement contemplated that Kalmar would withdraw her plea in abeyance more than thirty days after the plea proceeding. Because the plea in abeyance was not entered, the thirty-day limitation of section 77-13-6(2)(b) did not deprive the judge of jurisdiction.

ARGUMENT

POINT. THE TRIAL JUDGE HAD JURISDICTION TO WITHDRAW APPELLEE'S NO CONTEST PLEA IN ABEYANCE.

The state has not challenged the substance of the trial judge's ruling that the plea should be withdrawn.[4] The only issue raised by the state and therefore the only issue which is properly before this Court is the question of whether the trial judge had jurisdiction to withdraw the plea of no contest which had been held in abeyance.

The trial judge had jurisdiction to withdraw the plea since (1) Appellee was not informed of the thirty-day limitation where the judge did not refer to that limitation during the plea colloquy and did not incorporate the plea Affidavit into the colloquy; hence, the thirty-day limitation was not triggered in this case; (2) a trial judge can properly arrest judgment at any time prior to imposition of sentence pursuant to Rule 23, Utah Rules of Criminal Procedure, and (3) a plea in abeyance is not subject to the thirty-day limitation of Utah Code Ann. § 77-13-6(2)(b) (1995).

A. THE TRIAL JUDGE HAD JURISDICTION TO WITHDRAW THE PLEA SINCE APPELLEE WAS NOT INFORMED OF THE THIRTY-DAY LIMITATION.

Utah Code Ann. § 77-13-6 (1995) states in part:

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[4] As set forth infra at 25-30, the trial judge had good cause to withdraw the plea since there was not strict compliance with Rule 11, Utah Rules of Criminal Procedure in taking the plea, and a factual basis for the plea did not exist due to the lack of criminal intent. The trial judge's determination that this matter involved a civil accounting dispute rather than a crime established good cause for withdrawing the plea.

> (2) (a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.
>
> (b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.

Although this Court held in State v. Price, 837 P.2d 578 (Utah App. 1992) that the thirty-day limitation in section 77-13-6(2)(b) is jurisdictional and runs from the date of the plea proceeding, the "jurisdictional nature" of the statute is not triggered unless the defendant is informed of the thirty-day limitation at the time the plea is taken. See Price, 837 P.2d at 582. This Court reached its decision that the jurisdictional limit does not apply unless the defendant is informed of the thirty-day limitation by construing section 77-13-6(2)(b) "in conjunction with Rule 11 of the Utah Rules of Criminal Procedure." Price, 837 P.2d at 582.

> Rule 11(5)(g) states: "The court may refuse to accept a plea of guilty or no contest, and may not accept the plea until the court has found ... the defendant has been advised of the time limits for filing any motion to withdraw a plea of guilty or no contest." Rule 11(6) provides: "Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty or no contest is not a ground for setting the plea aside, but may be ground for extending the time to make a motion under Section 77-13-6." Therefore, although the language of Section 77-13-6(2)(b) is unconditional, it is subject to an exception incorporated within Rule 11.

Price, 837 P.2d at 582.

Requiring that the defendant be informed of the thirty-day rule in order to trigger the jurisdictional nature of section 77-13-6(2)(b) squares with this Court's prior decisions regarding

application of that section. See Price, 837 P.2d at 583 (discussing State v. Smith, 812 P.2d 470 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992) and State v. Quintana, 826 P.2d 1068 (Utah App. 1991)). This Court explained in Price that the defendants in Smith and Quintana were not informed of the thirty-day limitation since they pleaded guilty before section 77-13-6 was amended to include that limitation. The determination in those cases that the thirty-day limitation did not deprive the trial judge of jurisdiction was therefore correct.

Rule 11 and case law governing the validity of guilty pleas provide guidance in determining whether Kalmar was "informed" of the thirty-day limitation, thereby triggering the jurisdictional nature of that provision. See, e.g., State v. Maguire, 830 P.2d 216, 217-18 (Utah 1991). Rule 11(e) lists the findings to be made by a trial judge prior to accepting a guilty plea. It provides that "[t]hese findings may be based on questioning of the defendant on the record or, if used, an affidavit reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the affidavit." Rule 11(e), Utah Rules of Criminal Procedure (emphasis added).

Utah case law requires strict compliance with Rule 11 in the taking of guilty pleas, and allows reliance on information in the plea affidavits only where the affidavit is properly incorporated "when the trial judge ascertains in the plea colloquy that the defendant has read, has understood, and

acknowledges all the information contained [in the affidavit]." Maguire, 830 P.2d at 217; see also Smith, 812 P.2d at 477. In Smith, quoted favorably in Maguire, this Court looked to the affidavit in determining whether there was strict compliance with Rule 11 only because "the trial court carefully reviewed appellant's plea affidavit with appellant during the plea colloquy, and then incorporated the affidavit into the record of the plea hearing." Smith, 812 P.2d at 476. This Court emphasized:

> It is critical, however, that strict Rule 11 compliance be demonstrated on the record at the time the guilty or no contest plea is entered. [State v.] Gibbons, 740 P.2d [1309 (Utah 1987)] at 1313 (citing McCarthy v. United States, 394 U.S. 459, 470, 89 S.Ct. 1166, 1172, 22 L.Ed.2d 418 (1969)). Therefore, if an affidavit is used to aid Rule 11 compliance, it must be addressed during the plea hearing. Id. at 1314. The trial court must conduct an inquiry to establish that the defendant understands the affidavit and voluntarily signed it. The inquiry cannot stop there, however. ... Any omissions or ambiguities in the affidavit must be clarified during the plea hearing, as must any uncertainties raised in the course of the plea colloquy. Then the affidavit itself, signed by the required parties, Gibbons, 740 P.2d at 1313, can be incorporated into the record.

Smith, 812 P.2d at 477. Hence, in order to consider an affidavit when determining whether a defendant was informed of the thirty-day limitation, the trial judge must address the affidavit during the colloquy and inquire whether the defendant understands and voluntarily signed the affidavit.

Additionally, Rule 11(f) indicates that "[f]ailure to advise the defendant of the time limits" (emphasis added) for

moving to withdraw a plea may be grounds for extending the time for filing such a motion. Use of the word "advise" suggests that even if the thirty-day rule is outlined in a properly incorporated affidavit, the trial judge must advise the defendant of the limitation during the colloquy.

In the present case, the trial judge did not inform Kalmar during the colloquy that she must move to withdraw her plea of no contest within thirty days or lose the opportunity to do so. Pursuant to subsection (f) of Rule 11, the lack of such information during the colloquy provided a basis for extending the thirty days, and defeated the jurisdictional nature of the statute.

In addition, even if such information in the Affidavit would suffice to "advise" the defendant of the limitation, the jurisdictional nature of the thirty-day limitation was triggered only if the trial judge ascertained that Kalmar had read, understood and acknowledged the Affidavit. See Smith, 812 P.2d at 477; Maguire, 830 P.2d at 217; Price, 837 P.2d at 582; Rule 11(e), Utah Rules of Appellate Procedure.

Although paragraph 14 refers to the thirty-day rule, the trial judge did not ascertain that Kalmar had read, understood and acknowledged the Affidavit, and the Affidavit therefore was not incorporated into the plea colloquy. The only reference to the Affidavit during the colloquy was when the judge told Kalmar to sign the Affidavit after defense counsel inquired whether they should execute it. R. 54. This direction from the judge that

Kalmar sign the Affidavit is not sufficient under Maguire and Smith to establish that Kalmar read, understood and assented to the contents of the Affidavit.

Nor does the recitation in the Certificate of Attorney which is attached to the Affidavit meet the Rule 11(e) and case law requirement that the trial judge ascertain during the colloquy that the defendant has read, understood and acknowledges the contents of the affidavit. See Smith, 812 P.2d at 477. Counsel's discussions with a defendant and belief that the defendant understands is not a substitute for the requirement that during the plea hearing, the trial judge "must conduct an inquiry to establish that the defendant understands the affidavit and voluntarily signed it." See id.; see also Maguire, 830 P.2d at 217 (citing Smith, 812 P.2d at 470). In this case where the trial judge did not conduct such an inquiry, strict compliance with Rule 11 is not demonstrated.

Moreover, the Affidavit was not incorporated since ambiguities as to the application of the thirty-day limitation in this case were not clarified during the colloquy. Although the Affidavit indicated that the plea could be withdrawn only if a motion were filed within thirty days "after the entry of [the] plea," the plea in abeyance agreement anticipated withdrawal of the plea after the restitution hearing, which was scheduled for more than thirty days after the plea proceedings. In other words, although the Affidavit stated that a plea must be withdrawn within thirty days of entry of the plea, the plea in

abeyance agreement contemplated withdrawing the plea more than thirty days after the plea proceedings. The term "entry of plea" was not defined for Kalmar and she could have reasonably understood that "entry of the plea" would not occur until after the conclusion of the plea in abeyance agreement. It is not clear when the Affidavit is considered in conjunction with the plea in abeyance agreement, whether the thirty days began to run at the time of the plea proceeding or only after unsuccessful conclusion of the plea in abeyance agreement.[5]

Smith instructs that "[a]ny omissions or ambiguities in the affidavit must be clarified during the plea hearing" in order to incorporate the affidavit. Smith, 812 P.2d at 477. Hence, the Affidavit was not properly incorporated for two reasons: (1) the judge did not ascertain that Kalmar had read, understood and acknowledged the Affidavit, and (2) the judge did not clarify the ambiguities created by the inconsistency between the plea Affidavit and the plea in abeyance agreement.

The jurisdictional nature of section 77-13-6(2)(b) was not triggered in this case where the trial judge did not (1) advise Kalmar of the thirty-day limitation during the colloquy, (2) incorporate the Affidavit into the hearing and (3) clarify ambiguities in the Affidavit which were created by the plea in abeyance agreement. Since the jurisdictional nature of the thirty-day limitation was not triggered, the trial judge had the

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[5] Conviction would be entered in this case only if Kalmar unsuccessfully completed the plea in abeyance agreement; see discussion infra at 31-32.

authority to withdraw the plea.[6]

> B. THE TRIAL JUDGE PROPERLY ARRESTED JUDGMENT PURSUANT TO RULE 23, UTAH RULES OF CRIMINAL PROCEDURE.
>
> Rule 23, Utah Rules of Criminal Procedure provides:
>
> At any time prior to imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. ...

(emphasis added). The plain language of this rule allows a trial judge to arrest judgment where a defendant has pled guilty at any time prior to imposition of sentence. While facts are "proved" at a trial, they are "admitted" when a defendant pleads guilty or no contest. The inclusion of the words "or admitted" clarifies that a judge has the ability to arrest judgment after a defendant has pled guilty or no contest and prior to sentencing where good cause exists for such arrest of judgment.[7]

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[6] In order for the state to establish that the trial judge lacked jurisdiction under Section 77-13-6(2)(b), it must establish that the defendant was informed of the limitation. Although Appellee did not explicitly argue that the jurisdictional nature of the statute was not triggered, that argument was implicit in the proceedings below. Moreover, this Court can affirm on any reasonable legal grounds which are apparent in the record. See State v. Montoya, 937 P.2d 145, 149 (Utah App. 1997)(appellate court can affirm on grounds which are "apparent on the record").

[7] Although the parties did not refer to Rule 23, Utah Rules of Criminal Procedure during argument, the order being appealed reads as if it were an order arresting judgment. The judge based his ruling on his refusal to sentence or enter judgment against Kalmar because he did not believe a crime had been committed. Moreover, this Court can properly affirm the order on this legal basis regardless of whether it was raised below since the record supports such affirmance. See Montoya, 937 P.2d at 149 (citing Limb v. Federated Milk Producers Ass'n, 461 P.2d 290, 293 n.2 (Utah

Allowing a defendant to withdraw a guilty plea at any time prior to sentencing harmonizes with the other statutes and rules that control criminal proceedings. A criminal case is initiated by the filing of an Information. Utah Code Ann. § 77-2-2 (1995). After the criminal matter is commenced by the filing of an Information, the district court has jurisdiction over the matter until entry of a final order dismissing the case or final judgment of conviction.[8] In order to sentence a

---

1969))(appellate court will affirm judgment on any proper legal ground which is apparent on the record).

[8] Pursuant to statute and rules, district court judges have limited authority to act in criminal cases following judgment of conviction. For example, a notice of appeal is filed in the trial court within thirty days after judgment. Rule 4, Utah Rules of Appellate Procedure. A trial judge has the power to enter an order extending the time for filing a notice of appeal for up to thirty days after the notice is originally due. Id. Additionally, a trial judge can entertain a motion for new trial if that motion is filed within ten days after judgment. Rule 24, Utah Rules of Criminal Procedure.

In Price, this Court assumed that "entry of the plea" occurred during the plea proceeding, without considering alternative meanings for that term. See Price, 837 P.2d at 582-83. The term "entry of the plea" is ambiguous, however, in that it could refer to the time at which the defendant "enters a plea" by stating "no contest" or "guilty" on the record, or it could refer to the later time at which the trial judge enters the plea in the court record as a judgment of conviction.

Construing the term to mean the time at which the trial judge enters the plea as a judgment of conviction would harmonize with other rules and statutes. A defendant would have thirty days after entry of judgment to either file a notice of appeal or motion to withdraw. Trial judges with jurisdiction over a criminal case would not be deprived of the authority to withdraw a plea, while maintaining the power to oversee all other matters relevant to the case.

Support for construing section § 77-13-6(2)(b) to allow thirty days to withdraw a plea following entry of judgment of conviction is found in the legislative history of the statute. Senator Carling, who sponsored the senate bill, informed the legislators that the bill was designed to prevent defendants from returning to court four or five years down the road and asking to

defendant, a trial judge must be convinced that there is a legal basis for doing so. Indeed, at sentencing proceedings, trial judges almost universally inquire as to whether there is a legal reason not to sentence a defendant. A legal reason not to sentence a defendant certainly includes the existence of an illegal plea.

In addition, sentencing often occurs more than thirty days after a plea is entered. The trial judge's power to arrest judgment ensures that prosecutors follow through on sentencing recommendations and other provisions of plea agreements. Since

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withdraw pleas after evidence had been lost. The senator indicated, "this bill has been presented which would indicate that a person may withdraw their guilty plea only within 30 days after they entered that plea **and there has been a final disposition**... ." See Addendum F containing comments by Senator Carling to the Utah State Senate. The legislative history does not suggest the intent to limit the authority of a trial judge to withdraw pleas where the judge otherwise has jurisdiction over a criminal case and has not yet sentenced the defendant.

While there is support for the Price interpretation that the thirty days begin to run at the plea proceeding, the efficient administration of a criminal case requires that a trial judge who finds good cause for withdrawing a plea prior to sentencing have the authority to do so. Moreover, this Court reached its decision in Price by comparing motions to withdraw guilty pleas with filing provisions for notices of appeal and petitions for writ of certiorari. Such filings are distinct from motions to withdraw pleas since they create jurisdiction which does not otherwise exist. Rule 4, Utah Rules of Appellate Procedure creates appellate jurisdiction only if the notice is timely filed; likewise, Rule 47, Utah Rules of Appellate Procedure allows for certiorari jurisdiction only if the petition is timely filed. By contrast, the Price interpretation of section 77-13-6(2)(b) takes away power to withdraw pleas in cases where a trial judge otherwise has jurisdiction over the case.

This Court need not reconsider its conclusion in Price that the thirty days begin to run at the plea proceeding, however, since Rule 23, Utah Rules of Criminal Procedure provides an alternative grant of authority to a trial judge to arrest judgment prior to imposition of sentence.

failure to comply with a plea agreement can be grounds for withdrawal of the plea (see Santobello v. New York, 404 U.S. 257 (1971); State v. Gladney, 951 P.2d 247 (Utah App. 1998)), it follows that a trial judge has the power to allow a defendant to withdraw a plea at any time prior to sentencing in order to provide a procedure for withdrawal to defendants where sentencing is scheduled more than thirty days after the plea proceeding.[9] Rule 23 provides this power to the trial judge.

Moreover, where there is basis for withdrawing a plea, a defendant can proceed under Rule 65B, Utah Rules of Civil Procedure. See Utah Code Ann. § 77-13-6(3). Since a defendant can withdraw an illegal plea at any time under Rule 65B, the efficient administration of justice requires that a trial judge who has jurisdiction over a case and who finds good cause to withdraw the plea be able to do so prior to sentencing. An unnecessary waste of resources would occur if defendants who enter involuntary or otherwise illegal pleas and decide to withdraw such pleas prior to sentencing were not allowed to do so pursuant to Rule 23. The plain language of Rule 23, along with the trial judge's continued jurisdiction over the criminal case, give the judge the authority to allow withdrawal of a plea at any time prior to sentencing where good cause for such withdrawal exists. The efficient administration of justice along with Rule 23 require that a trial judge have the power to withdraw a

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[9] In most felony cases, sentencing occurs more than thirty days after the plea proceeding in order to allow Adult Probation and Parole time to prepare a presentence report.

bad plea prior to sentencing even if more than thirty days has passed from the plea hearing.

Good cause existed in this case to arrest judgment since the judge did not comply with Rule 11 in accepting the plea and the facts did not indicate that a crime had been committed. Rule 11(e), Utah Rules of Criminal Procedure states in part:

> (e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:
>
> . . .
>
> (2) the plea is voluntarily made;
>
> (3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;
>
> (4) (A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;
>
> (B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;
>
> (5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;
>
> (6) if the tendered plea is a result

> of a prior plea discussion and plea agreement, and if so, what agreement has been reached;
>
> (7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and
>
> (8) the defendant has been advised that the right of appeal is limited.
>
> These findings may be based on questioning of the defendant on the record or, if used, an affidavit reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the affidavit.
>
> . . .

Where the trial judge does not strictly comply with Rule 11, withdrawal of the plea is the appropriate remedy. See Smith, 812 P.2d at 476. As set forth supra at 16-18, strict compliance with Rule 11 must be demonstrated on the record by either questioning of the defendant during the colloquy or by proper incorporation of an affidavit at the colloquy. See Rule 11(e), Utah Rules of Criminal Procedure; Smith, 812 P.2d at 476-77. An affidavit is properly incorporated only "when the trial judge ascertains in the plea colloquy that the defendant has read, has understood, and acknowledges all the information contained [in the affidavit]." Rule 11(e), Utah Rules of Criminal Procedure; Maguire, 830 P.2d at 217.

In this case, the trial judge did not strictly comply with Rule 11 at the plea hearing. First, the judge did not make any findings as required by the rule; nor did he state that he accepted Kalmar's plea. R. 51-53. Specifically, the judge did not find that the plea was voluntary, that Kalmar knew her constitutional rights and waived those rights, that she

understood the elements and that the state would be required to prove those elements beyond a reasonable doubt, that there was a factual basis for the plea, that Kalmar had been advised of the thirty-day limit for withdrawal of a plea, or that Kalmar had been advised that her right to appeal was limited. Failure to make these findings constitutes noncompliance with Rule 11, demonstrating good cause for arrest of judgment. See Smith, 812 P.2d at 476.

In addition to not making the required findings, during the colloquy, the court did not inform Kalmar of several of the items required by Rule 11. The trial judge did not fully inform Kalmar of the rights she was waiving. Instead, he told Kalmar that she was waiving her "rights to trial" and outlined only some of those rights. R. 51.

> Trial judge: If I accept your plea to no contest on this case, you're waiving all of your rights to trial. That means from this point on, there would be no trial. The state would not be obligated to call witnesses to testify against you, you would waive your rights of silence, and acknowledge at least what happened here, so that we could get to the evidentiary hearing. Do you understand that?

R. 51. The trial judge did not specify that Kalmar enjoyed a presumption of innocence, that the state would otherwise be required to prove beyond a reasonable doubt that she committed the crime, that she had the right to have a jury decide whether she was guilty, that she had a right to confront and cross-examine witnesses or that she had the right to compel the attendance of defense witnesses. See Rule 11(e)(3).

During the colloquy, the trial judge also did not discuss the nature or elements of the offense. While he informed Kalmar that she would be pleading to attempted theft, a class A misdemeanor and the potential sentence for that offense, the trial judge did not outline the elements that the state would have to prove to convict her of that charge. R. 52.

Nor does the transcript of the plea proceeding demonstrate a factual basis for the plea. The prosecutor's initial statement does not cover the factual basis for the plea. See R. 47-8. After Kalmar pleaded no contest, defense counsel stated:

> Defense counsel: The issue is, she put in her resignation for employment, and at the time she put in her resignation she still had some money coming on her commissions. She didn't receive a salary; she got a percentage on all book sales. She made sixteen percent. And the resignation--the letter of resignation was in August of '94, and so terminated her employment at that time.
>
> And after she terminated her employment, checks came to her directly from the people that she sold the books to. So she endorsed the checks and deposited them in her bank account.
>
> Actually, I think her sister did on two of them. But she felt that she had money coming, and that was the issue.

R. 54-5. This passage coupled with the remainder of the colloquy fails to establish that Kalmar actually committed the crime of attempted theft or that the state had "sufficient evidence to establish substantial risk of conviction." Rule 11(e)(4)(B). Indeed, nothing suggests criminal intent on Kalmar's part, a necessary element of the crime. Hence, the colloquy does not demonstrate that "there is a factual basis for the plea."

Rule 11(e)(4)(B).

The colloquy also does not outline all of the details of the plea in abeyance agreement nor include questioning by the judge to ascertain that Kalmar understood and agreed to the terms of the agreement. Hence, there was not strict compliance with subsection (6) of Rule 11(e).

Finally, the colloquy does not indicate that the trial judge advised Kalmar during the hearing of the time limits for filing a motion to withdraw plea or that her right to appeal would be limited by the plea. The colloquy therefore fails to demonstrate strict compliance with the requirements of subsections 7 and 8 of Rule 11.

Since the trial judge did not ascertain during the colloquy that Kalmar had read and understood the Affidavit and acknowledged all of the information in the Affidavit, the Affidavit was not incorporated into the record. See Maguire, 830 P.2d at 217; Rule 11(e), Utah Rules of Criminal Procedure. Because the Affidavit was not incorporated, strict compliance with Rule 11 must be demonstrated during the colloquy. In this case where the colloquy does not demonstrate strict compliance with Rule 11 requirements, the trial judge had good cause to arrest judgment.

Additionally, even if the Affidavit were considered, the Affidavit fails to demonstrate a factual basis for the plea, as that term is defined in Rule 11(e)(4)(B). Pursuant to Rule 11(e)(4)(B), "[a] factual basis is sufficient if it establishes

that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction."

Under the elements section of the Affidavit, the following handwritten paragraph appears:

> On 8-10-94 [through] 9-7-94 the defendant, a party to the offense attempted to exercise unauthorized control over the property of Cooks Books with the purpose to deprive the owner and the value exceeded 1,000 but less than $5,000.

R. 19. In the section of the Affidavit where the factual basis for the plea is to be included, the handwritten phrase "same as elements" appears. R. 19.

These portions of the Affidavit coupled with the plea colloquy fail to demonstrate that Kalmar committed the crime of attempted theft or that there was sufficient evidence to establish a substantial risk that she would be convicted of that crime. Indeed, the Affidavit adds nothing regarding the factual basis of the plea, and the limited recitation of the facts during the colloquy suggests that Kalmar lacked the required "purpose to deprive" and that her control over the money might not have been unauthorized.

In this case where the plea was not accepted in strict compliance with Rule 11, a factual basis for the plea did not exist, and there was no showing of criminal intent, the trial judge had good cause to arrest judgment.

C. A PLEA IN ABEYANCE IS NOT SUBJECT TO THE THIRTY-DAY LIMITATION OF SECTION 77-13-6(2)(b).

A plea in abeyance contemplates that any such plea which is accepted by a trial judge will not be entered as a conviction unless and until the plea in abeyance agreement is violated. Utah Code Ann. §§ 77-2a-1 through 4 outline the requirements for pleas in abeyance. Utah Code Ann. § 77-2a-1 provides in part:

> (1) "Plea in abeyance" means an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions set forth in a plea in abeyance agreement.

This section clarifies that a trial judge "accepts" a plea in abeyance but does not enter judgment of conviction nor impose sentence for such pleas. Hence, a plea in abeyance is not "entered" at the plea hearing.

Utah Code Ann. § 77-2a-2(1) further clarifies that while a judge "accepts" a plea in abeyance, he treats that plea differently than a regular guilty or no contest plea since he holds the plea in abeyance and does not enter it as a judgment of conviction. The plea in abeyance statutes contemplate that in many cases, a plea will be withdrawn after the defendant successfully completes the agreement, and the charge dismissed. See Utah Code Ann. § 77-2a-3 (Supp. 1997). In most cases, this withdrawal of the plea will occur more than thirty days after the plea hearing. Hence, while pleas in abeyance are "accepted," they are not "entered" as are regular pleas. The requirement of section 77-13-6(2)(b) that a defendant make a motion to withdraw a guilty plea within thirty days of entry therefore does not

apply to pleas in abeyance.[10]

In this case, the trial judge never explicitly stated that he accepted Kalmar's plea. Additionally, he did not comply with the Rule 11(e) requirements nor make the findings which are required prior to acceptance of a guilty plea. While the plea may not even have been "accepted" by the trial judge, its status as a plea in abeyance further defeats the application of section 77-13-6(2)(b) since a plea in abeyance, by its very nature, is not "entered" until after the conclusion of the plea in abeyance agreement.[11] The plea in abeyance agreement contemplated that the plea would be withdrawn months after the plea proceeding. Hence, the plea in abeyance agreement reflected the statutory expectation that pleas in abeyance are "entered," if at all, after the conclusion of the plea in abeyance agreement. Since Kalmar's no contest plea in abeyance was not "entered," the thirty-day limitation of section 77-13-6(2)(b) had not begun to run and the trial judge had the power to withdraw the plea in abeyance.

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[10] If the thirty-day limitation of section 77-13-6(2)(b) began to run at the plea proceeding for pleas in abeyance, commonly used plea in abeyance agreements could not be utilized. Ordinarily, a plea in abeyance agreement runs for a set period of time greater than thirty days, during which the defendant is required to meet certain conditions.

[11] This is a proper grounds for affirmance regardless of whether it was raised below. See Montoya, 937 P.2d at 149. The trial judge, believing he had jurisdiction to withdraw the plea, simply ordered that the plea be withdrawn without exploring the statutory bases for his power.

CONCLUSION

The trial judge correctly concluded that he had the authority to withdraw Kalmar's no contest plea in abeyance. That authority was based on three distinct grounds: (1) the thirty-day limitation of section 77-13-6(2)(b) was not triggered since Kalmar was not informed of that limitation; (2) Rule 23, Utah Rules of Criminal Procedure allows a judge to arrest judgment at any time prior to imposition of sentence regardless of the thirty-day limitation in section 77-13-6(2)(b); and (3) the plea in abeyance was not "entered" and therefore the thirty-day limitation of section 77-13-6(2)(b) had not begun to run. Accordingly, Appellee Linda Kalmar respectfully requests that this Court affirm the trial judge's order allowing her to withdraw her no contest plea in abeyance.

SUBMITTED this 1st day of July, 1998.

Joan C. Watt

JOAN C. WATT
Attorney for Defendant/Appellee

Lynn R. Brown

LYNN R. BROWN
Attorney for Defendant/Appellee

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 S. State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 E. 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 1st day of July, 1998.

Joan C. Watt
JOAN C. WATT

DELIVERED copies to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 1 day of July, 1998.

ADDENDUM A

LYNN R. BROWN, #0460
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

SALT LAKE DEPARTMENT, DIVISION I

THE STATE OF UTAH,	:	**ORDER ALLOWING DEFENDANT TO WITHDRAW NO CONTEST PLEA IN ABEYANCE**
Plaintiff,	:	
v.	:	
LINDA KALMAR,	:	Case no. 971900756FS
Defendant.	:	JUDGE DAVID S. YOUNG

Pursuant to the defendants motion, IT IS HEREBY ORDERED that her plea in abeyance to a Class A Theft that was entered on September 15, 1997 is withdrawn. After reviewing the material and discussing the matter with Ernie Jones, Deputy District Attorney and defendants attorney, Lynn R. Brown, the Court on the motion of the defendant terminates the plea in abeyance and declines to enter judgement against her.

DATED this 24th ~~day of~~ November, 1997.

HONORABLE DAVID S. YOUNG
Third District Court

ADDENDUM B

AGREEMENT FOR PLEA IN ABEYANCE

In accordance with Rule 11, Utah Rules of Criminal Procedure and Utah Code §77 2a-2,3 & 4. Linda Kalmar, by and through her attorney, Lynn R. Brown and the State by and through its attorney Ernie Jones and with the approval of this Court, enter into the following agreement for a plea in abeyance:

1. The defendant will enter a no contest plea to Theft, a Class A Misdemeanor.

2. At the time Linda Kalmar enters a no contest plea, the attorney for the State, Ernie Jones and the attorney for Linda Kalmar, Lynn R. Brown will move the Court to hold the plea in abeyance and not enter a judgment of conviction nor impose sentence pending the completion of this agreement. Linda Kalmar waives her right to have sentence imposed within the time periods contained in Rule 22(a), Utah Rules of Criminal Procedure.

3. It is understood by the parties, that the issue to be resolved by this agreement and plea in abeyance is whether or not Linda Kalmar owes any restitution to her former employer, Cooks Books, for having deposited three checks into her personal checking account in the total amount of $1,530.28.

4. To resolve the question of restitution, it is agreed that the Court may set a restitution hearing date and allow the parties at that time to present evidence to support their claims.

5. If the Court determines at a restitution hearing that Linda Kalmar has money owing to her by Cooks Books in the amount of $1,530.28 or more then it is agreed that Mrs. Kalmar will pay no restitution to Cooks Books and the plea in abeyance may be withdrawn and the case dismissed by the Court, after at least 6 months has expired from the

date of the entry of the plea.

6. If the Court determines at the restitution hearing that Linda Kalmar owes any amount to Cooks Books, then Mrs. Kalmar will be ordered to pay the determined amount within a specified time frame to be agreed upon by the parties. After completing the payment of restitution as ordered by the Court, the plea in abeyance may be withdrawn and the case dismissed.

7. If at any time during the term of the plea in abeyance agreement, Linda Kalmar violated any conditions, the Court may order her appearance to show cause why the agreement should not be terminated. If it is determined after an evidentiary hearing that Mrs. Kalmar has failed to substantially comply with any term or condition of this agreement, the Court may terminate the agreement and enter judgement and conviction and impose sentence against her for the offense to which the original plea was entered.

This agreement entered into this 15 day of September, 1997.

ERNIE JONES, Deputy District Attorney

LINDA KALMAR, Defendant

LYNN R. BROWN, Attorney for Defendant

The terms and conditions as provided in this agreement, are approved by the Court

HONORABLE DAVID S. YOUNG

ADDENDUM C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

STATE OF UTAH

THE STATE OF UTAH,	)	STATEMENT OF DEFENDANT
Plaintiff,	)	CERTIFICATE OF COUNSEL AND ORDER
v.	)	
Linda Kalmar,	)	Case No. _____ FS
Defendant.	)	

COMES NOW, Linda Kalmar, the defendant in this case and hereby acknowledges and certifies the following:

I have entered a plea of (guilty) (no contest) to the following crime(s):

CRIME & STATUTORY PROVISION	DEGREE	PUNISHMENT
A. Att. Theft	class A	1yr SLC, fine $2500 fine 85% SAT-charge
B.		
C.		

I have received a copy of the (charge) (information) against me, I have read it, and I understand the nature and elements of the offense(s) for which I am pleading (guilty) (no contest).

The elements of the crime(s) of which I am charged are as follows:

on 8.10.94 thx 9-7-94 the defendant, a party to the offense attempted to exercise unauthorized control over the property of Cooks Books with the purpose to deprive the owner and the value exceeds 1,000 but less than $5,000

My conduct, and the conduct of other persons for which I am criminally liable, that constitutes the elements of the crime(s) charged are as follows:

Same as elmt

I am entering this/these plea(s) voluntarily and with knowledge and understanding of the following facts:

1. I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the court at no cost to me. I recognize that a condition of my sentence may be to require me to pay an amount, as determined by the court, to recoup the cost of counsel if so appointed for me.

2. I (have not) (have) waived my right to counsel. If I have waived my right to counsel, I have done so knowingly, intelligently and voluntarily for the following reasons:

3. If I have waived my right to counsel, I have read this statement and understand the nature and elements of the charges, my rights in this and other proceedings and the consequences of my plea of guilty.

4. If I have not waived my right to counsel, my attorney is Lynn R., and I have had an opportunity to discuss this statement, my rights and the consequences of my guilty plea with my attorney.

5. I know that i have a right to a trial by jury.

6. I know that if I wish to have a trial I have the right to confront and cross-examine witnesses against me or to have them cross-examined by my attorney. I also know that I have the right to compel my witness(es) by subpoena at state expense to testify in court upon by behalf.

7. I know that I have a right to testify in my own behalf but if I choose not to do so I can not be compelled to testify or give evidence against myself and no adverse inferences will be drawn against me if I do not testify.

8. I know that if I wish to contest the charge against me I need only plead "not guilty" and the matter will be set for trial. At the trial the state of Utah will have the burden of proving each element of the charge beyond a reasonable doubt. If the trial is before a jury the verdict must be unanimous.

9. I know that under the Constitution of Utah that if I were tried and convicted by a jury or by the judge that I would have the right to appeal by conviction and sentence to the Utah Court of Appeals or, where allowed, the Utah Supreme Court and that if I could not afford to pay the costs for such appeal, those costs would be

paid by the state.

10. I know the maximum sentence that may be imposed for each offense to which I plead (guilty) (no contest). I know that by pleading (guilty) (no contest) to an offense that carries a ~~mini~~mum mandatory sentence that I will be subjecting myself to serving a minimum mandatory sentence for that offense. I know that the sentences may be consecutive and may be for a prison term, fine, or both. I know that in addition to a fine a twenty-five percent (25%) surcharge, required by Utah Code Annotated §63-63a-4, will be imposed. I also know that I may be ordered by the court to make restitution to any victim(s) of my crimes.

11. I know that imprisonment may be for consecutive periods, or the fine for additional amounts, if my plea is to more than one charge. I also know that if I am on probation, parole, or awaiting sentencing on another offense of which I have been convicted or to which I have plead guilty, my plea in the present action may result in consecutive sentences being imposed upon me.

12. I know and understand that by pleading (guilty) (no contest) I am waiving my statutory and constitutional rights set out in the preceding paragraphs. I also know that by entering such plea(s) I am admitting and do so admit that I have committed the conduct alleged and I am guilty of the crime(s) for which my plea(s) is/are entered.

13. My plea(s) of (guilty) (no contest) (is) (is not) the result of a plea bargain between myself and the prosecuting attorney. The promises, duties and provisions of this plea bargain, is any, are gully contained in the Plea Agreement attached to this

affidavit.

14. I know and understand that if I desire to withdraw my plea(s) of (guilty) (no contest) I must do so by filing a motion within thirty (30) days after entry of my plea.

15. I know that any charge or sentencing concession of recommendation of probation or suspended sentence, including a reduction of the charges for sentencing made or sought by either defense counsel or the prosecuting attorney are not binding on the judge. I also know that any opinions they express to me as to what they believe the court may do are also not binding on the court.

16. No threats, coercion, or unlawful influence of any kind have been made to induce me to plead guilty, and no promises except those contained herein and in the attached plea agreement, have been made to me.

17. I have read this statement or I have had i read to me by my attorney, and I understand its provisions. I know that I am free to change or delete anything contained in this statement. I do not wish to make any changes because all of the statements are correct.

18. I am satisfied with the advice and assistance of my attorney.

19. I am 57 years of age; I have attended school through the college degree BS grade and I can read and understand the English language or an interpreter has been provided to me. I was not under the influence of any drugs, medication or intoxicants which would impair my judgment when the decision was made to enter the plea(s). I am not presently under the influence of any drug, medication or intoxicants which

impair my judgment.

20. I believe myself to be of sound and discerning mind, mentally capable of understanding the proceedings and the consequences of my plea and free of any mental disease, defect or impairment that would prevent me from knowingly, intelligently and voluntarily entering my plea.

DATED this 15 day of Sept, 1997.

Linda A Kahman
DEFENDANT

CERTIFICATE OF ATTORNEY

I certify that I am the attorney for Linda Kahman, the defendant above, and that I know he/she has read the statement or that I have read it to him/her and I have discussed it with him/her and believe that he/she fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.

Lynn R. Fran 0460
ATTORNEY FOR DEFENDANT/BAR #

23

CERTIFICATE OF PROSECUTING ATTORNEY

I certify that I am the attorney for the State of Utah in the case against Linda Kalmar, defendant. I have reviewed this statement of the defendant and find that the declarations, including the elements of the offense of the charge(s) and the factual synopsis of the defendant's criminal conduct which constitutes the offense are true and correct. No improper inducements, threats or coercion to encourage a plea have been offered defendant. The plea negotiations are fully contained in the statement and in the attached plea agreement or as supplemented on record before the court. There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense(s) for which the plea(s) is/are entered and acceptance of the plea(s) would serve the public interest.

PROSECUTING ATTORNEY/BAR #

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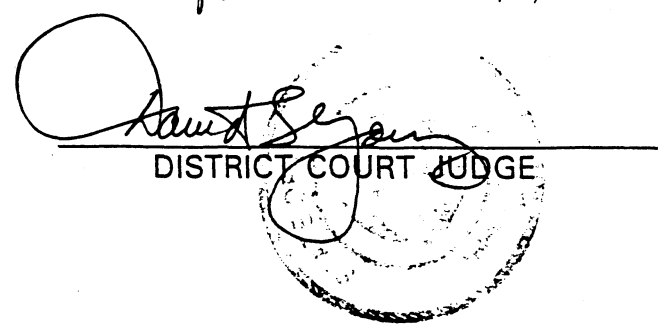
ORDER

Based upon the facts set forth in the foregoing statement and the certification of the defendant and counsel, the court witnesses the signatures and finds the defendant's plea of (guilty) (no contest) is freely and voluntarily made and it is so ordered that the defendant's plea of (guilty) (no contest) to the charge(s) set forth in the statement be accepted and entered.

DONE IN COURT this 16 day of Sept, 1997.



DISTRICT COURT JUDGE

ADDENDUM D

SEPTEMBER 15, 1997 SALT LAKE CITY, UTAH

P R O C E E D I N G S

THE COURT: STATE VERSUS LINDA ANNETTE KALMAR. CASE NO. 971900756 FS. APPEARANCES, PLEASE.

MR. BROWN: LYNN BROWN APPEARING ON BEHALF OF MS. KALMAR.

THE COURT: THANK YOU, MR. BROWN. AND FOR THE STATE?

MR. JONES: EARNEST JONES FOR THE STATE.

THE COURT: THANK YOU. MR. JONES.

MR. BROWN: YOUR HONOR, WE HAVE RESOLVED THIS MATTER WITH A PLEA TO A CLASS A. MISDEMEANOR. NO CONTEST. AND WE HAVE A PLEA IN ABEYANCE FORM OR AGREEMENT THAT WE NEED TO GO OVER WITH THE COURT. COULD WE DO THAT?

THE COURT: I DON'T CARE MUCH FOR PLEAS IN ABEYANCE. WE HAVE JUST DONE IT LAST WEEK, AND I AM SURE IT'S A STATUTORY CONCEPT THAT HAS TO BE ALLOWED TO PARTIES, SO WE HAVE TO DEAL WITH IT.

BUT THE STATUS OF THE FILE DURING THE PERIOD OF THE ABEYANCE, I DON'T WANT IT TO BE AN OPEN CASE. I WANT BE TO A CLOSED FILE, BECAUSE IT'S RESOLVED BY THE PLEA IN ABEYANCE, SO IT DOESN'T

STAND AS A CASE PENDING FOR A YEAR ON THE CASE PENDING FILE.

Q. (BY MR. BROWN) WELL, I ANTICIPATED IT TO BE-- WHAT WE WOULD WANT IS, THE ONLY ISSUE HERE IS A QUESTION OF WHO OWES WHO MONEYS. A QUESTION OF RESTITUTION. AFTER THE RESTITUTION HEARING, WE HAVE PROVIDED THAT IF SHE SHE OWES NO RESTITUTION, OR IF THEY OWE HER MONEY, THEN THE CASE IS TO BE DISMISSED. I THINK IT WILL BE --

THE COURT: SO WE NEED TO SET A RESTITUTION HEARING?

MR. BROWN: THAT'S CORRECT?

THE COURT: OKAY. ALL RIGHT. ARE YOU COMFORTABLE WITH THE AGREEMENT, THEN?

MR. JONES: YES, I AM. AND WE HAVE GONE OVER THE AGREEMENT, JUDGE. IT'S SATISFACTORY. IT'S IN WRITING. LET ME, IF I COULD, JUST EXPLAIN TO THE COURT WHY WE'RE USING A PLEA IN ABEYANCE IN THIS CASE.

THIS CASE OCCURRED IN AUGUST OF 1994. AND IT WAS NOT EVEN BROUGHT TO OUR ATTENTION FOR ALMOST A YEAR, SO WE STARTED DOING PROSECUTION OR THE INVESTIGATION IN '95. FOR SOME REASON SHE WAS NOT EVEN PICKED UP ON IT UNTIL MAY OF 1997, SO THE CASE IS RATHER OLD.

MOST OF THE WITNESSES WE HAVE ON THE CASE WOULD HAVE TO COME FROM OUT OF STATE, WHICH CERTAINLY INCURS A REAL EXPENSE FOR US. THE RESTITUTION IN THIS CASE, AT LEAST FROM OUR STANDPOINT, IS AROUND $1,500. SO WHEN YOU START COMPARING THE COST OF PROSECUTION AND THE AMOUNT OF RESTITUTION, IT'S PROBABLY A FAIR RESOLUTION OF THE MATTER.

THE OTHER THING, IT'S MY UNDERSTANDING SHE DOES NOT HAVE A PRIOR CRIMINAL RECORD. SHE WAS WORKING FOR A BOOK COMPANY, AND FROM OUR STANDPOINT, SHE TOOK SOME CHECKS THAT SHOULD HAVE BEEN SENT TO THE COMPANY, AND INSTEAD KEPT THOSE AND CASHED THOSE. SO I THINK IT'S REALLY CASE OF POOR JUDGEMENT ON HER PART.

THE COURT: WELL, THEN, WHY DO WE WANT TO -- WHY DON'T WE HAVE THE EVIDENTIARY HEARING FIRST AND THEN SEE WHAT WE DO WITH THE CASE?

MR. JONES: WELL, I THINK SHE'S WILLING TO DO THE PLEA IN ABEYANCE SO WE GET THE ISSUES OF GUILT OR INNOCENCE OUT OF THE WAY. AND WE'LL JUST BRING IN THE EVIDENCE ON THE RESTITUTION TO DETERMINE HOW MUCH IF ANY IS OWING.

THE COURT: BUT THE PLEA IS NO CONTEST.

MR. JONES: NO CONTEST. THAT'S RIGHT.

THE COURT: WHICH DOESN'T -- I MEAN, I WILL ACCEPT IT AS THOUGH IT WERE A GUILTY PLEA, BUT IT'S REALLY NOT A ACKNOWLEDGEMENT. SHE'S NOT -- AS I GET THE FEEL FOR THIS CASE, FOR WHATEVER THAT'S WORTH, MY IMPRESSION IS THAT THE STATE IS NOT INTERESTED IN PROSECUTING HER. IF YOU WENT THROUGH THE EVIDENCE AND YOU FOUND OUT THAT, INDEED, THEY OWED HER MONEY, YOU WOULDN'T WANT TO PROSECUTE HER.

MR. JONES: RIGHT. THAT'S WHY WE'RE WILLING -- IF THE COURT DETERMINES THERE IS NO RESTITUTION OWING, I THINK WE ARE GOING TO ESSENTIALLY DISMISS THE CASE. SO I DON'T THINK THAT'S THE WAY IT'S GOING TO COME DOWN, BUT --

THE COURT: AND OF COURSE WE DON'T KNOW THAT.

MR. JONES: RIGHT.

THE COURT: DO YOU HAVE ANY OBJECTION TO HAVING THE EVIDENTIARY HEARING FIRST?

MR. JONES: I JUST -- TO US, THE ONLY ISSUE IS RESTITUTION. HOW MUCH, IF ANY, IS OWING. AND WE THOUGHT BY DOING A PLEA IN ABEYANCE, WE COULD RESOLVE THAT AND JUST GET TO THE RESTITUTION QUESTION.

THE COURT: AND I SUPPOSE THAT THERE ARE PROBLEMS WITH THE FIFTH AMENDMENT OR OTHER PROBLEMS

IN TERMS OF A RESTITUTION HEARING IF YOU HAVEN'T DEALT WITH THE PLEA.

MR. JONES: RIGHT. THAT COULD BE, YES.

THE COURT: ALL RIGHT. SO YOU'RE COMFORTABLE WITH THIS AGREEMENT.

MR. BROWN: THAT'S WHAT WE AGREED TO, YES.

THE COURT: OKAY. FINE. ALL RIGHT. MS. KALMAR, DO YOU UNDERSTAND WHAT'AS BEING SREQUESTED HERE OF THE COURT?

THE DEFENDANT: YES.

THE COURT: YOU'RE ASKING, THROUGH YOUR COUNSEL, THAT I AUTHORIZE YOU TO ENTER WHAT'S CALLED A PLEA IN ABEYANCE, WHICH MEANS THAT YOU WILL ENTER A PLEA TITLED "NO CONTEST", BUT IT WOULD BE INTERPRETED BY ME AS AN ADMISSION OF OF GUILT IN THE EVENT I LATER HAD TO REVIEW THIS FOR SOME REASON.

IN OTHER WORDS, I COULD TREAT IT AS THOUGH IT WERE A GUILTY PLEA WHEN IT'S A NO CONTEST PLEA. I KNOW THAT SOUNDS A BIT CONFUSING.

MR. BROWN: I EXPLAINED TO HER THAT IT HAS THE SAME FORCE AND EFFECT AS A GUILTY PLEA. YOU CAN DO THE SAME THING THAT YOU COULD ON THIS AS A GUILTY PLEA. THE ONLY DIFFERENCE IS, SHE DOESN'T ADMIT ANY CULPABILITY OR WRONG-DOING.

THE COURT: RIGHT. SO WHAT SHE'S CLAIMING

IS THAT WHATEVER ERRORS WERE MADE WERE BOOKKEEPING PROBLEMS OR SOMETHING OF THAT NATURE.

MR. BROWN: YEAH. WE'LL GET INTO THAT IN THE RESTITUTION HEARING.

THE COURT: OKAY. ALL RIGHT. IF I ACCEPT *YOUR PLEA TO NO CONTEST ON THIS CASE, YOU'RE WAIVING* ALL OF YOUR RIGHTS TO TRIAL. THAT MEANS THAT FROM THIS POINT ON, THERE WOULD BE NO TRIAL. THE STATE WOULD NOT BE OBLIGATED TO CALL WITNESSES TO TESTIFY AGAINST YOU, YOU WOULD WAIVE YOUR RIGHTS OF SILENCE, AND ACKNOWLEDGE AT LEAST WHAT HAPPENED HERE, SO THAT WE COULD GET TO THE EVIDENTIARY HEARING. DO YOU UNDERSTAND THAT?

THE DEFENDANT: I UNDERSTAND THAT, WITH THE *PROVISO THAT WE'LL HAVE THE RESTITUTION HEARING.*

THE COURT: YES.

MR. JONES: AND THAT I CAN OFFER EVIDENCE AT THAT TIME.

THE COURT: THAT WILL BE UNDERSTOOD. OKAY. HAVE YOU BEEN SATISFIED WITH THE ADVICE OF YOUR ATTORNEY, MR. BROWN?

THE DEFENDANT: YES.

THE COURT: ARE YOU AT THIS TIME UNDER THE *INFLUENCE OF ANY DRUG, ALCOHOL, NARCOTIC, OR* ANYTHING THAT WOULD IMPAIR YOUR JUDGMENT?

THE DEFENDANT: COUPLE OF ASPIRIN.

THE COURT: COUPLE OF ASPIRIN. DO THEY IMPAIR YOUR JUDGMENT?

THE DEFENDANT: I DON'T THINK SO.

THE COURT: ALL RIGHT. AND DO YOU FEEL CAPABLE OF PROCEEDING?

THE DEFENDANT: YES.

THE COURT: ALL RIGHT. THEN TO THE AMENDED INFORMATION, THEFT, A CLASS A. MISDEMEANOR -- ARE WE AMENDING THE AMOUNT, MR. JONES?

MR. JONES: YES.

MR. BROWN: I HAVE MADE IT AN INTENT.

THE COURT: OKAY?

MR. JONES: OKAY.

THE COURT: INCHOATE OFFENSE OF ATTEMPTED THEFT, AND THEN THE AMOUNT STAYS?

MR. BROWN: YES.

THE COURT: OKAY. AND THE PENALTY FOR A CLASS A. MISDEMEANOR MAY BE ONE YEAR IN THE COUNTY JAIL AND A FINE OF OF $2,500. DO YOU UNDERSTAND THAT?

THE DEFENDANT: YES, UH-HUH.

THE COURT: TO THIS OFFENSE, DO YOU PLEAD GUILTY, NOT GUILTY, OR NO CONTEST?

THE DEFENDANT: NO CONTEST.

THE COURT: ALL RIGHT. HOW LONG WILL THE RESTITUTION HEARING TAKE, AND ARE YOU READY TO PROCEED WITH IT?

MR. JONES: PROBABLY A COUPLE OF HOURS.

MR. BROWN: IT COULD TAKE A LITTLE TIME. I I HAVE TO GET SOME OF THE RECORDS FROM THIS COMPANY, WHICH IS OUT OF STATE, SO --

THE COURT: YOU WANT SOME TIME TO SET IT.

MR. BROWN: I WILL WANT SOME TIME. SOME TIME. PROBABLY ABOUT THE MIDDLE OF NOVEMBER. IF I COULD, TO DEAL WITH THAT. BECAUSE I'M GOING TO HAVE TO DIG UP SOME RECORDS AND OLD CHECKS FOR COMMISSIONS THAT THEY HAVE PAID TO HER. SO I HAVE GOT TO DIG UP ALL THE FINANCIAL RECORDS. SO THAT COULD GO BACK A WHILE.

THE COURT: DO YOU HAVE ANY DIFFICULTY WITH THOSE DATES, MR. JONES?

MR. JONES: NO. THAT'S FINE, YOUR HONOR.

THE COURT: WHY DON'T WE SET IT FOR AN HOUR AND A HALF HEARING FOR NOVEMBER 6, AT 8:30. OKAY. ANY DIFFICULTY WITH WITH THAT, COUNSEL?

MR. BROWN: IS THAT A FRIDAY?

THE COURT: IT'S A THURSDAY MORNING AT 8:30, AND I'M SETTING THIS SO THAT IT'S 8:30 TO TEN, BECAUSE TEN O'CLOCK WOULD BE MY TIME THAT I WOULD BE

ANTICIPATING BEGINNING A TRIAL.

MR. BROWN: THAT SHOULD BE OKAY, YOUR HONOR.

THE COURT: I WILL APPRECIATE IT IF THIS MATTER, WHEN YOU GET ALL THE THE DATA AND THE RECORDS, IF YOU HAVE AN ABILITY TO STIPULATE, LET ME KNOW WELL IN ADVANCE OF THAT, SO THAT I CAN HAVE THAT TIME BACK. I DO HAVE A TRIAL SET THE DAY BEFORE, AND IF I COULD START THAT TRIAL EARLIER I WOULD.

SO THERE IS GOING TO BE NO COMMUNICATION BETWEEN US BETWEEN NOW AND THE DATE OF THE RESTITUTION HEARING. NO PRETRIAL OR ANYTHING LIKE THAT. SO LET ME KNOW IN ADVANCE IF YOU CAN REACH AN AGREEMENT.

MR. BROWN: SHALL WE EXECUTE THIS?

THE COURT: YES. IF YOU WILL SIGN THE STATEMENT OF THE DEFENDANT. AND MR. BROWN, YOU STATED THAT YOU WANTED TO SAY SOMETHING MORE ABOUT THE FACTS AND ELEMENTS?

MR. BROWN: YES. IF YOU'D LIKE ME TO.

THE COURT: I THOUGHT YOU SAID YOU WERE GOING TO.

MR. BROWN: THE ISSUE IS, SHE PUT IN HER RESIGNATION FOR THE EMPLOYMENT, AND AT THE TIME SHE

PUT IN HER RESIGNATION SHE STILL HAD SOME MONEY COMING ON COMMISSIONS. SHE DIDN'T RECEIVE A SALARY; SHE GOT A PERCENTAGE OF ALL THE BOOK SALES. SHE MADE SIXTEEN PERCENT. AND THE RESIGNATION -- THE LETTER OF RESIGNATION WAS IN AUGUST OF '94, AND SO TERMINATED HER EMPLOYMENT AT THAT TIME.

AND AFTER SHE TERMINATED HER EMPLOYMENT. CHECKS CAME TO HER DIRECTLY FROM THE PEOPLE THAT SHE SOLD THE BOOKS TO. SO SHE ENDORSED THE CHECKS AND DEPOSITED THEM IN HER BANK ACCOUNT.

ACTUALLY, I THINK HER SISTER DID ON TWO OF THEM. BUT SHE FELT THAT SHE HAD THE MONEY COMING, AND THAT WAS THE ISSUE.

THE COURT: I GUESS THAT WOULD BE BE OFFSET AGAINST THE 16 PERCENT OR 18 PERCENT.

MR. BROWN: YES.

THE COURT: OKAY. ALL RIGHT. THE RECORD MAY SHOW IN OPEN COURT THAT THE DEFENDANT HAS SIGNED THE STATEMENT OF THE DEFENDANT AND THE COURT WILL ADD ITS SIGNATURE AS A WITNESS TO HERS. YOU WILL NOTE I HAVE GONE THROUGH AN ABBREVIATED COLLOQUY IN THIS CASE.

JUST SO THAT EACH OF YOU UNDERSTAND, FOR THE COMPUTER'S PURPOSES, THIS CASE WILL BE DISMISSED UNDER A CATEGORY CALLED "OTHER," AND IT SIMPLY WILL

BE DISMISSED AS OF THIS TIME. THAT DOESN'T MEAN IT'S RESOLVED, IT SIMPLY MEANS THAT FOR COMPUTER PURPOSES IT'S NOT AN ON-GOING, PENDING CASE.

MR. BROWN: THANK YOU.

THE COURT: OKAY.

(PROCEEDINGS CONCLUDED.)

ADDENDUM E

NOVEMBER 6, 1997 SALT LAKE CITY, UTAH

P R O C E E D I N G S.

(COMMENCING AT 8:30 A.M.)

THE COURT: GOOD MORNING. THIS IS THE TIME SET FOR CONSIDERATION OF THE MATTER THE STATE OF UTAH VERSUS LINDA ANETTE KALMAR, 971900756. THIS ISS TIME SET FOR A RESTITUTION HEARING. COUNSEL, FIRST, WILL YOU EACH STATE YOUR APPEARANCES.

MR. BROWN: LYNN BROWN APPEARING ON BEHALF OF MS. KALMAR.

MR. JONES: ERNEST JONES ON BEHALF OF THE STATE.

THE COURT: WHAT'S ANTICIPATED TODAY?

MR. BROWN: I GUESS WHEN WE TALKED ABOUT IT A COUPLE OF DAYS AGO, I GUESS WE DECIDED TO SET IT FOR A TRIAL.

THE COURT: OKAY. LET'S MAKE A RECORD OF THE DISCUSSION, SO THAT WE HAVE FORMAL RECORD. THE RECORD SHOULD SHOW -- AND IF YOU HAVE A DIFFERENT RECOLLECTION, PLEASE HELP ME OR EXPAND UPON THE RECOLLECTION OF YOUR OWN INFORMATION -- THAT AT THE REQUEST, I THINK, OF MR. BROWN, BOTH THE PROSECUTOR AND DEFENSE ATTORNEY MET WITH THE COURT A FEW DAYS AGO AND DISCUSSED AN ISSUE REGARDING THE DIFFICULTY

OF DETERMINING THE RESTITUTION.

THE ISSUE WAS THAT APPARENTLY AT THE TIME THAT THE DEFENDANT ENTERED A NO CONTEST PLEA, WHICH WAS ON THE 15TH OF SEPTEMBER, '97, THAT AT THAT TIME THE DEFENDANT, IT WAS ALLEGED BY THE COMPANY -- I THINK IT WAS A COMPANY CALLED COOK PUBLISHING.

MR. BROWN: COOKS BOOKS.

THE COURT: COOKS BOOKS. ANYWAY, A PUBLISHING COMPANY FOR WHICH SHE HAS BEEN PREVIOUSLY EMPLOYED, HAD INDICATED AND ALLEGED TO THE PROSECUTION THAT SHE HAD TAKEN IMPROPERLY SOME CHECKS AND DEPOSITED THEM TO HER ACCOUNT, AND IT WAS ABOUT $1,500.

THERE WAS THEN A DISCUSSION ABOUT THAT SHE OWED THEM MONEY AND THEY OWED HER MONEY, THAT THERE WAS REALLY A NEED FOR AN ACCOUNTING. AND THAT WAS THE ISSUE OF THE RESTITUTION.

THE COMPANY THEN SENT SOME OTHER RECENT CORRESPONDENCE THAT YOU HAD AND REFERRED TO AT THE TIME WE WERE MEETING IN MY CHAMBERS, AND INDICATED THAT IN FACT THE NET OBLIGATION AFTER THEY OFFSET THE COMMISSIONS THEY OWED HER AND THE MONEY THAT SHE OWED THEM, AND SO ON, WAS SOMETHING LIKE $687 DOLLARS, IF I RECALL FROM THE DISCUSSION.

MR. BROWN: THAT'S PRETTY CLOSE, YES.

THE COURT: IN ANY EVENT, TO CONTINUE THE DISCUSSION FURTHER, I EXPRESSED TO THE STATE THAT I HAD SOME SERIOUS RESERVATIONS ABOUT ALLOWING THE PLEA TO STAND IF THIS WAS SIMPLY AN ACCOUNTING MATTER BETWEEN PARTIES AND NOT AND A CIVIL MATTER THAT SHOULD BE RESOLVED IN THE CIVIL COURT BECAUSE YOU FEEL THAT THERE IN FACT WAS A CLASS A. MISDEMEANOR TO WHICH SHE PLED.

IN FACT, I THOUGHT IT WAS A THIRD DEGREE FELONY, BUT I SEE NOW IN MY INFORMATION SHE PLED TO AN ATTEMPTED THEFT. WHICH IS A CLASS A. THAT EVEN SO, I WOULD NOT BE INCLINED, AS I RECALL OUR DISCUSSION, TO PUT SOMEBODY IN THE STATE PRISON FOR ZERO TO FIVE ON SUCH A CIRCUMSTANCE. THAT WAS OUR DISCUSSION.

AT THAT POINT I THINK, MR. BROWN, YOU INDICATED THAT PERHAPS YOUR CLIENT WOULD WANT TO TO WITHDRAW THE PLEA, AND WE WOULD THEN SET IT FOR TRIAL.

NOW, IS THAT A AN ACCURATE REPRESENTATION OF OUR DISCUSSION?

MR. BROWN: I THINK THAT'S FAIRLY ACCURATE.

THE COURT: MR. JONES?

MR. JONES: I THINK THAT'S CORRECT, YOUR HONOR.

THE COURT: IS THERE ANYTHING THAT EITHER OF YOU WISH TO ADD TO THE RECORD?

MR. BROWN: NO.

MR. JONES: THERE IS. AND THAT IS, I JUST DON'T THINK AT THIS POINT IN TIME AT THAT THE DEFENDANT CAN WITHDRAW THE PLEA. AS YOU HAVE ALREADY POINTED OUT, SHE ENTERED A NO CONTEST PLEA ON THE 15TH OF SEPTEMBER. WE'RE ALMOST TWO MONTHS BEYOND THAT POINT NOW ON THE 6TH OF NOVEMBER. IF I READ THE STATUTE CORRECTLY, 77-13-6, SHE HAS TO MAKE A REQUEST TO WITHDRAW THAT PLEA, AND I BELIEVE IT HAS TO DONE WITHIN 30 DAYS FOR GOOD CAUSE SHOWN.

THERE IS A CASE CALLED STATE VERSUS PRICE, 837 PACIFIC 2D, 578. I THINK ONCE THE 30 DAYS IS UP SHE CANNOT WITHDRAW THE PLEA. SO I WOULD SIMPLY ASK THE COURT TO DENY THE REQUEST TO WITHDRAW THE PLEA AT THIS POINT.

THE COURT: IS IT YOUR REQUEST TO WITHDRAW THE PLEA?

MR. BROWN: WELL, I'M A LITTLE SURPRISED. BECAUSE I THINK LAST TIME WHEN WE WERE DISCUSSING IT MR. JONES SAID, "WELL, LET'S JUST SET IT FOR TRIAL."

SO I DIDN'T THINK THERE WAS GOING TO BE ANY PROBLEM WITH REGARD TO THAT.

THE COURT: I SEE.

MR. BROWN: BUT AS I INDICATED TO THE COURT, THE INFORMATION THAT WE RECEIVED MAKES IT VERY CLEAR TO ME THAT THERE WAS NO CRIMINAL INTENT INVOLVED HERE. AND IT'S SIMPLY A MATTER THAT SHOULD HAVE BEEN LITIGATED IN THE CIVIL COURTS.

IF THE COURT'S NOT INCLINED TO TAKE THE WITHDRAWAL OF THE PLEA, I GUESS WE'LL HAVE TO DEAL WITH THAT.

THE COURT: I CERTAINLY HAVEN'T READ THIS RECENT CASE. I DO KNOW WHEN WE ADVISE PEOPLE THAT GO THROUGH THE COLLOQUY OF A PLEA THAT WE DO INDICATE THAT THEY CAN WITHDRAW THEIR PLEA ANY TIME WITHIN 30 DAYS.

I WILL TELL YOU THAT IF YOU FILE A MOTION TO WITHDRAW THE PLEA, I BELIEVE THERE'S GOOD CAUSE FOR ALLOWING THE PLEA TO BE WITHDRAWN.

MR. BROWN: I DIDN'T KNOW THERE WAS GOING TO BE ANY ISSUE ABOUT THAT.

THE COURT: THEN THE COURT WILL AUTHORIZE THE WITHDRAWAL OF THE PLEA, AND DENY THE OBJECTION OF THE STATE. SO THAT PLEA IS WITHDRAWN AND STRICKEN IN THIS CASE. NOW, I ASSUME THAT TAKES US BACK, FOR TECHNICAL REASONS, BACK TO THE THEFT, A THIRD DEGREE FELONY WHICH WAS THE ORIGINAL CHARGE IN THE INFORMATION.

MR. JONES: IN LIGHT OF YOUR RULING, IF YOU ARE GOING TO ALLOW HER TO WITHDRAW THE PLEA, I WOULD SUGGEST THAT RATHER THAN SET IT FOR TRIAL, IF YOU WOULD SET IT OVER FOR 30 DAYS TO GIVE ME AN OPPORTUNITY TO CONSIDER WHETHER OR NOT WE WANT TO APPEAL THE COURT'S RULING.

THE COURT: ALL RIGHT.

MR. JONES: I DO THINK THE STATUTE ALLOWS THE STATE TO APPEAL THAT PARTICULAR PROVISION. BUT I THINK RATHER THAN SETTING IT FOR TRIAL, I WOULD LIKE SOME TIME TO THE LOOK AT THAT.

THE COURT: OKAY. ANY OBJECTION TO THAT?

MR. BROWN: NO.

THE COURT: OKAY. I DON'T HAVE ANY OBJECTION TO THAT EITHER. LET ME PUT IT THIS WAY: I HAVE ALREADY INDICATED TO YOU WHAT I AM INCLINED TO DO. I DID THAT IN MY CHAMBERS EARLIER, AND I'M A LITTLE CONCERNED AS TO WHETHER WE FLESHED OUT THE LAW ADEQUATELY FOR THE ISSUES ON APPEAL. MR. JONES, YOU BRING UP YOUR ARGUMENT AT THAT POINT REFERRING TO THIS CASE AS 837 PAC. 2D 578, I THINK YOU SAID.

MR. JONES: YES.

THE COURT: WHICH OF COURSE I HAVEN'T READ RECENTLY,

MR. JONES: IF YOU WANT TO TAKE IT UNDER

ADVISEMENT --

THE COURT: I REALLY DON'T. I'M GOING TO RULE THIS WAY, BUT I AM JUST WONDERING IF YOU WANT TO FLESH IT OUT BY ANY OTHER PLEADINGS.

IF YOU WANT, MR. BROWN, TO FILE A MOTION TO WITHDRAW THE PLEA, OR IF YOU'RE SATISFIED WITH THE RECORD, I'M SATISFIED WITH THE DISCUSSION THAT I HAD THAT I'M NOT COMFORTABLE ACCEPTING A PLEA. IT WAS A NO CONTEST PLEA; IT WAS NOT AN ADMISSION OF GUILT, AND I'M JUST NOT GOING TO BE HAPPY WITH A PLEA UNDER THOSE CIRCUMSTANCES.

I FIRST THOUGHT THAT SHE HAD -- BASICALLY THE CHARGE MAY HAVE BEEN -- EVEN BEEN A LITTLE INNACURATE IN THE SENSE THAT IT WAS CHARGED AS A THEFT, WHEN IN FACT IT PROBABLY SHOULD HAVE BEEN CHARGED AS EMBEZZLING, I SUPPOSE. SHE HAD THE LAWFUL RIGHT TO HAVE THE CHECKS WHICH SHE DEPOSITED INTO HER ACCOUNT.

AND THEN THERE WAS THIS OFF-SETTING SITUATION. SO I DON'T KNOW. THE CASE IS JUST AN UNCOMFORTABLE CASE FOR ME. I'M NOT WILLING TO SEND SOMEBODY TO PRISON AND ALLOW THE POTENTIAL THAT THEY WILL GO TO PRISON ON THE BASIS OF THE RECORD I KNOW HAVE.

THAT MEANS THAT BOTH OF YOU MAY DISCOVER

AND GIVE ME OTHER INFORMATION HEREAFTER. SO THE PLEA IS WITHDRAWN. I'LL GIVE YOU 30 DAYS TO CONSIDER WHETHER TO APPEAL THE MATTER. THAT WOULD MEAN THAT TODAY IS THE 6TH ARE NOVEMBER, SO HOW ABOUT YOU FILE YOUR NOTICE OF READINESS ON OR BEFORE DECEMBER 5TH, WHICH IS A FRIDAY. OR NOTICE OF APPEAL, WHICH IS A FRIDAY, DECEMBER 5TH, WHICH IS A FRIDAY.

SHALL WE NOW SET THE CASE FOR REVIEW ON DECEMBER 8 SO THAT WE DON'T LET IT GET LOST IN THE FILING SYSTEM?

MR. BROWN: IS THAT ON YOUR REGULAR CALENDAR?

THE COURT: A SIMPLE REVIEW ON MONDAY MORNING. DECEMBER 8. AND IF THE CASE IS GOING TO GO FURTHER, BE RETURNED BACK FOR FOR TRIAL, WE'LL SET THE PRETRIAL AND TRIAL AT THAT TIME, OR WE'LL RESOLVE IT, HOWEVER YOU DETERMINE.

MR. JONES: THE SECTION OF THE CODE THAT I CITED WAS 77-13-6. TALKS ABOUT WITHDRAWAL OF PLEA.

THE COURT: OKAY. ALL RIGHT. WELL, I WILL CONSIDER THIS CASE NEXT ON DECEMBER 8 FOR REVIEW.

MR. BROWN: THANKS, JUDGE.

THE COURT: THANK YOU EACH. THE COURT'S IN RECESS. WILL YOU PREPARE AN ORDER, MR. BROWN,

WITHDRAWING THE PLEA, DOING WHAT I HAVE JUST SAID TODAY.

MR. BROWN: YES.

THE COURT: OKAY.

(PROCEEDINGS CONCLUDED AND COURT IN RECESS AT 8:50 A.M.)

ADDENDUM F

SENATE BILL 81
WITHDRAWAL OF GUILTY PLEA AMENDMENTS

SENATE DEBATE
JANUARY 24, 1989

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Sen. Carling: Mr. President. At the present time, there is no limitation on when a person can withdraw a guilty plea. The courts and prosecutors have indicated this has happened sometimes even after four and five years after a person has entered a guilty plea when there's no way to come back and retry their case after the evidence is gone. In order to be fair to both the defendant and to the state, this bill has been presented which would indicate that a person may withdraw their guilty plea only within 30 days after they entered that plea and there has been a final disposition or, and also requires at the time that the person makes their plea that the court be advised that he has 30 days to withdraw that guilty plea or that right would be withdrawn. There was no opposition from either side in the committee hearings in this matter. We do need to have one amendment, if there's no questions, to add to the bill. Mr. Chairman, I see no question. I would, we passed out an amendment on the buff copy. This is a law which also amends the Utah Rules of Procedure, and in amending Rules of Procedure, it takes a two-thirds vote of the body. This language incorporates the fact that we are amending the Rules of Procedure as well as the law. I would move the adoption of the amendments that have been passed out in regards to Rules of Procedure.

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HOUSE DEBATE

Mr. Speaker: Senate Bill 81. Madam Reading Clerk.

Reading Clerk: Senate Bill 81, Withdrawal of Guilty Plea Amendments by Senator Richard J. Carling. Be it enacted by the Legislature of the State of Utah.

Mr. Speaker: Representative Cuttle.

Rep. Cuttle: Thank you, Mr. Speaker. This bill comes to us from the state-wide association of prosecutors and the issue here is a 30-day retraction of a guilty plea. Sometimes people are sentenced to jail and they plead guilty, then they go to jail, and then they wait a long time and they send a lot of motions and then they come back and withdraw the plea. And so this puts a 30-day time limit on it. Most of these complaints are from the prison down at the point of the mountain. Sometimes they've gone as long as four to five years before they withdrew the guilty plea, and then that has been sent to the court of appeals and they've overruled it. So this is just streamline it and get it back where everything's fair and a speedy trial.

Mr. Speaker: Is there discussion to Senate Bill 81? I see no lights, Representative. I'll return to you for sum-up.

Rep. Cuttle: Waive sum-up.

Mr. Speaker: Summation's waived. Voting's open on Senate Bill 81.